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IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

FRED. W. SMITH *et al.*, *Appellants*,
vs.
THE UNITED STATES, *Appellee.*

Appeal from the Supreme Court of Arizona.

BRIEF AND ARGUMENT FOR APPELLANTS.

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STATEMENT OF CASE.

This was a suit brought by Appellee upon the official bond of Fred. W. Smith, as Receiver of Public Moneys at Tucson, Arizona.

Smith was appointed to this position February 28, 1887, and on March 7, 1888, with the other appellants as his securities, gave the bond upon which this suit is brought, the penalty in the bond being $30,000:

The condition was as follows:

"The condition of the foregoing obligation is such that:

"Whereas, the President of the United States has appointed the said Frederick W. Smith to be receiver of public moneys at Tucson, Arizona, by commission dated February 28th, 1887, and said Frederick W. Smith has accepted said appointment:

"Now, therefore, if the said Frederick W. Smith shall at all times during his holding and remaining in said office, carefully discharge the duties thereof, and faithfully disburse all public moneys and honestly account without fraud or delay for the same and for all public funds and property which

shall or may come into his hands, then the above obligation to be void and of no effect; otherwise to remain in full force and virtue"; and signed by the defendants.

Smith was retained in the office until the latter part of November, 1889, when he was removed, and Charles R. Drake was appointed his successor. He assumed the duties of the office, taking charge of books and papers on December 3, 1889.

During the early part of Smith's incumbency there was no Register of the local land office.

Then one Duff was appointed Register, but by reason of ill-health was unable to give attention to his duties.

Mr. Herbert Brown was appointed Register of this office July 17, 1889.

Smith was in poor health during 1889, and as the result of this general condition in the office during the summer and fall of 1889, a vast amount of business had accumulated in the land office at Tucson undisposed of.

An immense number of entries of public land had been made there; and as is well understood, passing upon the "final proofs," and all the numerous questions of fact connected therewith, determining regularity of papers, etc., etc., requires concerted action by the Register and Receiver.

If all is found to be regular, the Register issues his certificate which goes to the General Land Office; the Receiver takes the payment due for the land and gives what is known as the "final receipt," which, showing payment, goes to the entryman, and upon both, the patent for the land ultimately issues.

The execution of these papers are simultaneous acts, of even date, always.

During Smith's term, as stated, very little was done in the way of passing upon "final proofs."

Large numbers, upon different entries, were "submitted" to the local office, but the officers were not prepared to act

upon them, so this class of business, unacted upon, largely accumulated.

As each entryman presented his paper on "final proof" he gave to the receiver the necessary amount, to pay the balance due on the land, in case the "final proofs" should be accepted and the final certificate and "receipt" issue, in these cases usually one dollar per acre, besides fees.

This money, of course, would go to the Government if the "proofs" should be allowed, and be returned by the receiver to the entryman if the "proofs" should be rejected or the entryman should change his entry or relinquish altogether.

The receiver gave no receipt for this money; the rules of the General Land Office prohibited that.

No account of such moneys was kept, or required to be kept, as between the receiver and the Government.

It was never deposited as "public money," nor in any way treated as money with which the Government had any interest until after "final receipt" actually issued and the entryman vested with an equitable interest in the land shown upon paper; then, for the first time, would the money appear in the accounts as "public money," and be deposited to the credit of the Treasury.

This was the constant, uniform practice until after April 30, 1890, when "Letter M," to be referred to later, was promulgated from the General Land Office.

Under this state of circumstances and of practice, Smith received, before he went out of office, December 3, 1889, about $40,000.

Upon learning of Smith's removal from office, and the fact of his being the depository of large sums of money, in this way, being a matter of common knowledge, and Smith being insolvent as well, Mr. Christy, one of appellants, sought Smith to secure what he could for ultimate protection in case of established liability.

He got from Smith $25,000 about December 1, 1889.

In November, 1889, one Harlan, as an officer of the Government, from the Department of the Interior, came out to Tucson "to take charge of the office and settle up with Smith as Receiver" (Transcript, p. 119).

Mr. Christy, in behalf of himself and the other securities upon this bond, saw Harlan a number of times as to Smith's accounts as receiver, and he said "Mr. Smith's accounts were straight and he did not owe the Government a dollar" (Tr., p. 120).

Mr. Christy says (p. 120), "I went to him and told him that I had come in the interest of the bondsmen; that I had received $25,000 from Fred. W. Smith, and that I was prepared to settle any balance that I found due the Government, and he replied that there was no balance due."

After this assurance Mr. Christy proceeded to refund to entrymen who had deposited with Smith their several deposits until the $25,000 was exhausted.

So matters went on until April 30, 1890.

There were a large number of cases pending on "final proofs" submitted to Smith, in which the money deposited had not been refunded by Christy, and for want of payment to Drake the local officers were withholding the final papers.

Not a single case of entry involved in this record had been acted upon up to this date, not one; and every "final receipt" was issued *after* this date.

Will your Honors bear in mind, this was nearly five months after Smith had been removed and his successor had been in possession and down to this time (confessedly below, and it will not be denied here, I believe) the Government not only made no claim to a dollar of the money so deposited with Smith, but it had been the settled, uniform course and holding of the Interior Department and of the General Land Office that under the law "moneys are not payable to a receiver of public moneys until an entry has been allowed by the register and a certificate given.

"Any moneys placed in the hands of a receiver or sent to

him, to be afterwards applied to an entry, are not moneys lawfully paid to the receiver, for which the United States is responsible, but are simply individual deposits in the nature of a personal trust. Such moneys are not received officially. They can be received by the receiver only in his personal capacity, as a private individual, and recourse for such deposits must be had against him personally by the parties aggrieved." (6 L. D., 714.)

It was always held that no official relation attached to such moneys until the "entries of lands claimed were actually allowed." (*Idem*, 714.)

The official decision of the Secretary of the Interior, in every case presented to him involving the question here (and they are numerous, and will be cited in the argument later), down to and including the Dysart case, 23 L. D., 282, are uniform, that the payment of the purchase price of land to the receiver *before the acceptance* of final proof is at the risk of the purchaser," that until a formal acceptance of "final proof," and the issue of "final receipt" there was no sale or final entry of the land, and the money remained the private property of the entryman.

But on April 30, 1890, in view of the condition at Tucson, the Commissioner of the General Land Office made a ruling, shown by "Letter M," *infra*, in which he not only laid down a new rule as to future practice, but while confessedly overturning the settled rule above stated, sought to apply the newly created liability to transactions occurring in Smith's time, although Smith had been out of office nearly five months.

This is the letter:

"LETTER M." DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, WASHINGTON, D. C.,
April 30th, 1890.

Register and Receiver, Tucson, Arizona:

SIR I enclose herewith a statement as taken from the records of your office showing the final proofs now in your

office awaiting examination, on which the money in payment for the same was paid to Fred W. Smith, the late Receiver, and was by him appropriated to his own use, and never accounted for to the United States. You are instructed to examine all the final proofs now in your office, as shown by the accompanying list, and if the same is found sufficient you will request the parties in interest to furnish an affidavit, properly attested, showing that they did pay the money to Fred W. Smith, and whether the same was paid by draft or check. If the parties can furnish certified copies of these drafts or checks from the cashier of the Bank showing the same, you will obtain these copies and allow the entries as of date when proof and payment were made. You will refer on the entry papers and upon your records to this letter by initial and date, as your authority therefor. The Receiver will enter upon the books of his office, under the account of Fred W. Smith, late Receiver, the amount of purchase money received for each class of entry. You will give to said entries a half number corresponding to the time when said proof was accepted, and prepare supplemental abstracts of the same, noting thereon "Allowed by Letter 'M' of April 30," and purchase money is to be charged to Fred W. Smith, the late Receiver. You will then prepare an account current, form 4-105 thereof, and certify therein that the transaction reported appears from the records of your office. The Receiver will send a duplicate receipt to the entrymen, in accordance with the instructions herein contained, noting on the receipt as his authority, this letter by initial and date, and after you have carefully examined all these papers, as instructed in this letter, you will forward them to this office for future consideration.

The decision of this office heretofore has been against the allowance of an entry where the money be payable to the receiver of public moneys, if the moneys were not properly accounted for or deposited to the credit of the Treasurer of the United States. But, as a matter of equity in view of the general circular of this office, which provides that proof in no case must be accepted or received by Register and Receiver, and in view of the fact that entrymen had made their payments, in accordance with this circular issued by this office, it is the opinion of this office that the entries should

be allowed. I am aware that the views herein expressed are in conflict with the practice above referred to, but my understanding of the law and convictions of equity are so strong and clear, that, reluctant that I am to change the former practices, I feel myself compelled to do so in this case. I therefore hold that the moneys paid by entrymen to Fred W. Smith, Receiver, and received by him in his official capacity as such, were public moneys within the meaning and intent of the law, and the payment to him was a payment to the Government. The recourse of the United States is under the official bond of Mr. Smith, and as suit has already been instituted for the recovery of the amount received by him, the entries should be allowed without further delay.

Very respectfully,

WILLIAM STONE,
Assistant Commissioner.

That this letter and ruling therein contained was a complete revolution of the course of business of the Department of the Interior and General Land Office and alters the instructions and the decisions of the same, we will show later, in detail.

This letter, in terms, applies to the Tucson District. No circular fixing a general practice as to such moneys as these was issued from the General Land Office until May 14, 1895, when this order was promulgated.

M. DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

WASHINGTON, D. C., *May 14, 1895.*

To Registers and Receivers,

GENTLEMEN: From and after June 30, 1895, a uniform detailed record must be kept by the receiver and monthly report made to the Commissioner of the General Land Office of unearned fees and unofficial moneys received, re-

turned, and on hand at each local land office, consisting of moneys received as fees or commissions or in payment for land in cases where the applications to file or enter are incomplete or can not be allowed for any reason and of amounts deposited under the act of May 14, 1880, for giving notice of cancellation of entry in contest cases, and of all moneys deposited as security for the cost of transcribing testimony in contest cases, together with a statement of the amount refunded or reported in quarterly contest account in each case.

To this end I have caused to be sent you a special register, form No. 4–986, in which will be entered all such moneys received by you, the disposition made of the same and the amount on hand at the end of the month, and special form of statement thereof, form No. 4–541, for monthly report to this office, which report shall be a complete abstract of the record herein required.

All such unearned fees and unofficial moneys must be promptly returned to the parties from whom received or their legal representatives. The practice of holding the moneys paid in such cases, subject to the order of the applicant until the papers in the application are perfected or completed, is contrary to existing regulations and must be discontinued.

The record herein required to be kept must show the receipt and return of all such moneys. All moneys deposited for register's fee of notice of cancellation in contest cases, and all deposits for reducing testimony to writing in contest cases must be reported and all amounts returned to the depositor or paid for clerical services under act of August 4, 1886, or earned and carried into the register of cash receipts and balances must be entered in the proper column and under proper dates.

In connection with the receipt of moneys at the district land offices, you are advised that registers of the land offices have no right officially to receive any moneys whatever except such as are paid to them by receivers as salaries, fees, and commissions. Should any money be forwarded to the register or paid to him, he will at once pay over the

same to the receiver, as the latter is the proper officer to receive all moneys sent to the local land offices.

Very respectfully,

W. S. LAMOREUX,
Commissioner.

Approved:

WM. H. SIMS,
Acting Secretary.

It will be observed that even here such moneys are regarded as "*unofficial moneys*," and that is the rule to this date. To this hour such moneys are, by direct order, treated and held as "unofficial moneys."

For many years next preceding May 14, 1895, the only form of account kept by receivers under express direction of the Treasury and Interior Departments was this, as to credits to the United States, showing the only public moneys the receiver could have derived from disposition of public lands.

Under bond dated.....
The United States,
In account with Receiver of Public Moneys at.....

	Cr.
By balance due United States, as per last report.....	.....
" Sales of Public Lands.....acres, embracing Cash Entries No.....to No.....inclusive...	.....
" Sales of Mineral Lands,.....acres, embracing Entries No.....to No..... inclusive...	.....
.....	.....
.....	.....
By Fees received on.....Preemption Declarations.....	.....
" " " " ..... Homestead Declarations.....	.....
" " " " .....Mining Applications.....	.....
" " " "	.....
" " " "	.....
" " " " .....Homestead Entries.....	.....
" Commissions received on.....acres embraced thereby...	.....
" " " " .....Final Homesteads...	.....
" Fees received on Timber-culture Entries.....	.....
" Commissions received on.....acres embraced thereby...	.....
" " " " .....Final Timber-culture Entries	.....
" Fees received on.....	.....
" " " "	.....
" " " "	.....
" " " "	.....

This was the technical, legal form used in the accounts of receivers at local land offices, and included everything which such officers could receive as "public moneys."

No reference was ever made in any statement of account by a receiver at a local land office to moneys, such as are involved in this phase of this suit until after May 14, 1895. Since then, an account of such moneys has been kept on the books at the local land office, and regular returns made therefrom as to such moneys; but, under the circular, and in the accounts they are held and referred to as "*unofficial moneys*," as recited in the circular above, never as "public" or "official moneys."

The heading of the official form of the account as to "unofficial money," is as follows:

Detailed monthly statement of unearned fees and unofficial moneys received, earned, disbursed, or returned, and on hand for the month ending....., 189.., at the United States Land Office at ....., embracing fees or commissions, or payments for land in cases where applications to file or enter are incomplete or can not be allowed for any reason, and of amounts deposited for publication of notice, and as fees for notice of cancellation, and of all moneys deposited as security for cost of transcribing testimony in contest cases, together with a statement of amount refunded, paid publishers, or reported in Receiver's account.

The official form, in its footing, is as follows:

Total amount of unearned fees and unofficial moneys on hand to date, $.....

I certify that the foregoing is a correct statement of all unearned moneys received, returned, paid publishers, or reported in Receiver's account, and of amount on hand at the end of said month.

.....
Receiver.

Even to this date, these moneys are not treated as *public*, only as "*unofficial*," and therefore not *public*. Very clearly it would have been improper to credit the United States with moneys like those in suit, because every item in the forms provided was for actual cash *belonging to the United States*, to be then covered into the Treasury. These unofficial moneys were only in his hands *sub modo*, to await action upon

the "final proofs;" in the meantime the entry could be abandoned, or relinquished, in which case the money would be returned to the entryman without any order from the General Land Office. In like manner, if the proofs should fail, the Government had no rights to the funds, so that as uniformly held by the Secretary of the Interior, the status of the deposit, until "final receipt" was ready, was purely a matter between the entryman and the receiver.

The old form of keeping the accounts as to *public money*, as shown above, is still retained; that as to "unofficial moneys" is a separate matter, and so kept; one account as to "public moneys" and another as to "unofficial moneys." That is to say, prior to April 30, 1890, uniformly the General Land Office gave itself no concern as to cash deposited with a receiver pending an examination of "final proofs," because it announced and held, as did the Secretary of the Interior repeatedly, that the cash did not become public money until approval of "final proof" and the giving of "final receipt," when the Government parted with something, viz, an official paper evidence of legal interest or equity in the land on which patent should issue.

"Letter M" was based on Commissioner Stone's idea of equity in that particular case; but since then, such cash, so deposited, is officially declared not to be "public money," but "*unofficial money*." And prior to the reports under the circular of May 14, 1895, beginning with the fiscal year of 1896, neither the Treasury nor the Interior Department had anything of record, nor was it required that the receiver should have of record anything to show these deposits, for the obvious reason that they *were* not, and were not regarded as "*public* moneys."

The Government claimed below that the securities were liable for the amount of money deposited by the several entrymen with the submission of their "final proofs," in

accordance with the terms of "Letter M," and the court below sustained that view.

While there are some other questions presented by the record, the liability of these sureties upon this state of fact and Departmental rulings will be the only subject discussed in this brief.

I.

The moneys in question were not "public moneys."

The expression "public money" is self-defining.

It means money belonging to the people—to the Government, and when in the hands of a receiver, subject, on the instant, and at all times, to the order of the Secretary of the Treasury, and to be paid out for any public purpose, as authorized by law.

Elaboration can make this no plainer.

It was the duty of the receiver, Smith, to keep a faithful and true account of all public moneys which should come to his hands, and a form of account, as shown above, adopted by the Treasury and in use for years, and to this date, was used by him, which form shows every item of public fund which can possibly come to his hands as receiver.

This money was not of a character that could be entered upon that form.

It was not derived from *sale* of public land.

That item means, a sale consummated, as is well-known.

The account could properly show only money, actual cash, which, when entered on the account legally belonged to the United States, and which should at once be covered into the Treasury.

These deposits were made, not as a present payment, but as a deposit, *sub modo*, with the distinct understanding that the money was not to go to the Government, unless the proofs were approved, and a "final receipt" issued by the receiver.

The Government could not possibly have any legal interest in the money until then; it parted with nothing until "final receipt;" it could at any time, before the issue of the "final receipt," withdraw the land from disposition and put it to any other use, and the entryman have no legal right to complain.

This Court has repeatedly so decided.

Frisbie *vs.* Whitney, 9 Wall., 187.
Yosemite Valley Case, 15 Wall., 77.
Campbell *vs.* Wade, 132 U. S., 34.

These cases establish the doctrine, that the Government is not bound, until every preliminary step has been taken and been passed upon by the executive officers and the case closed.

As said in Frisbie *vs.* Whitney, "a vested right under the pre-emption laws is only obtained when the purchase money has been paid and the receipt of the proper land officer given to the purchaser."

Until then, as said by Mr. Justice Field, in Campbell *vs.* Wade, "the application to enter did not bind the applicant to proceed any further in the matter, nor could it bind the State to sell the lands."

Up to the date of finally approving the 'final proofs" and the issue of the "final receipt" not only is the Government not bound, but the entryman may abandon, or relinquish, and, of course, beyond question, the money, simply deposited, remains the money of the entryman until both the Government and he are bound.

Assuredly, the money could not be credited to the United States in the account of the receiver until the land was *sold, disposed of*, so that, reciprocally, the entryman received the evidence of the disposal of the land, which can only be

shown by the register's "certificate" and the receiver's "final receipt."

Under the statute, the receiver can only be held for "public money or property," and this money, so in Smith's hands, never became *public* property, for nothing was done by Smith as to the "final proofs"; every one upon which "final receipt" issued, involved in this record, was passed upon by Drake long after Smith went out of office, and by authority of "Letter M."

In view of this deferred action, let us consider this phase of the case.

The Government insists that because Smith was receiver and the object of the deposit was to secure title to public land, the acceptance of the deposit made it public money.

If that be so, then every dollar deposited became public funds, whether the "final proofs" were approved or not.

It cannot be claimed that the Government can legally get something for nothing; that it can get title to the citizen's money before it parts with its interest in the land proposed to be sold.

The argument proves too much.

The truth is, *all* is mere *proposal* on both sides until final certificate and receipt, till then the money is not "public;" the land is not private, but "public," and the status of both is changed by the execution of the papers named, and not until then.

Tested in another way:

If this was "public money," Smith and these sureties were liable for it on December 3, 1889, when he went out of office, for the liability of all was fixed by the status of the money at that date. That is clear.

Suppose suit had been brought then; no "Letter M" had been written, the rule that the deposit was a personal one, between the several entrymen and Smith as receiver,

until "final receipt" was operative; there was no statute then *nor now*, providing for or allowing such deposits as public matter; and suppose further, that the case had been brought to trial before any "final proofs" had been passed upon, or any "final receipts" issued by Drake.

Not a dollar could be recovered at such a trial in that state of case for the obvious reason at the threshold: that the Government had parted with nothing, and was not bound to part with anything in the land, and, besides, *non constat*, that any of the proofs would be approved, and if so, the Government would have its land and an adjudged legal title to the money as well.

Absurdity could go no further.

II.

THE LIABILITY OF THESE SURETIES IS FIXED BY THE STATUS OF AFFAIRS WHEN SMITH WENT OUT OF OFFICE DECEMBER 3, 1889.

If these moneys were not "public moneys" *then*, which might have been and should have been covered into the Treasury *then*, and which could properly be used for any public purpose, in such case these sureties are not liable.

Mr. Commissioner Stone could not in April, 1890, by Letter M, create a liability which theretofore did not exist.

A new rule in a Department cannot create a liability as to past transactions and be made to apply to one no longer in office.

Suppose, your Honors, that the office of receiver had been abrogated by law December 3, 1889, and the land office at Tucson closed at that date.

The Government was not bound to go on, as to unperfected entries, but could abandon them all, leaving everything in the status of December 3, 1889, and whatever that was, as

fixed either by express statute, general rule of law, or by proper regulation of the Interior Department, rights and liabilities would be determined.

There is no provision of statute governing the case in hand.

There is no general rule of law differing from our contention here.

The regulations of the Department were all to the point and effect that the Government did not have, nor claim any, interest in the final deposit until "final receipt" was ready, or at most until the local land officers were jointly ready to act.

Lady Bryan Silver Mining Co., 2 L. D., 673.

"Moneys are not payable to a receiver of public moneys until an entry has been allowed by the register and a receipt given. Any money placed in the hands of a receiver, to be afterwards applied to an entry are not moneys lawfully paid to the receiver for which the United States is responsible, but are simply individual deposits in the nature of a personal trust.

"Such moneys are not received officially. * * *

"They can be received by the receiver, only in his personal capacity as a private individual, and recourse for such deposits must be had against him personally by parties aggrieved."

"The receiver has no authority to receive money except when tendered in payment, upon an application made to the register, for the purchase of lands upon which the local officers are ready to act."

"A payment, received by the local officers in advance of the time when they are ready to act upon the application and allow the entry, is not in pursuance of any duty enjoined by law, and a failure to account for such sum, in the event the application is refused, is not a default as to any obligation due the Government, and the sureties would not be liable therefor.

"In the case under consideration, the money was not deposited with the receiver in payment for land, that the

Government *by any act of its officials had acted upon*, and I cannot see how the Government can be in any manner liable for its repayment, nor do I think the Government can recover the amount in a suit against the sureties, as it does not arise upon a default to the Government."

Secretary Vilas in Matthewsen and Ward, 6 L. D., 714.

This rule was affirmed, in terms, in E. W. Harris, 8 L. D., 77, where it is said:

"By a payment thus made, the applicant constitutes the receiver his agent to pay the money to the Government if the application is allowed, and if refuted, the receiver is individually liable for repayment and not the Government."

So as late as August, 1896, in Francis J. Dysart, 23 L. D., it is said: "The payment of the purchase price of land to the receiver before the *acceptance* of final proof is at the risk of the purchaser."

This was the regulation of the Department, the rule upon and under which the receiver and entrymen acted and were bound to act, when Smith went out of office December 3, 1889.

Not an entry was ready to be acted on by the local officers, nor was any acted upon until after April 30, 1890. And, therefore, by the action of the executive officers of the Government, the deposits were the property of the entryman and not "public money," and if the office had been abolished December 3, 1889, settlement by Smith with entrymen, severally, without direction or control by the Commissioner, would not only have been regular, but that would have been the only course which could have been pursued.

Smith was not *then* liable to the Government for a dollar of these funds, nor could his securities be for the same reasons.

As said by Receiver Drake (Tr., p. 85), "Up to April 30,

1890, the Government refused to treat these as payments and refused to authorize me to pass on proofs and issue receipts. Only by authority of Letter M was it that these receipts issued which came in that class" (Tr., p. 86). "The Government refused to take these as payments up to the time I received Letter M." "I could not pass the proofs until I had received the money from some source to pass them. The business of the office was blocked so far as these proofs were concerned."

Clearly these moneys were not received by Smith as "public moneys," but under the existing regulations as agent of the entryman, and if the office had been abolished, or suit brought against these sureties before April 30, 1890, *or if Letter M had never been written*, no claim would have been or could have been made against Smith for these moneys.

This is clear, outside of Letter M, which expressly concedes the claim in this brief, so far, and announces a *new* rule.

III.

BUT, A NEW RULE OR REGULATION IN A DEPARTMENT CANNOT CREATE A LIABILITY ON THE PART OF A SUBORDINATE, WHERE NONE EXISTED, AS TO PAST TRANSACTIONS, AND ESPECIALLY AS TO ONE NO LONGER IN OFFICE.

Letter M established a *new* rule.

It says: "The decision of the office has heretofore been against the allowance of an entry where the money be payable to the receiver of public moneys, if the money were not properly accounted for, or deposited to the credit of the United States," and "reluctant as I am to change the former practices, I feel myself compelled to do so in this case," and he proceeds to do so in that letter.

Now, conceding that the Commissioner has power to make all needful rules and regulations as to the disposal of the public lands, not in conflict with existing law, his rules

and regulations so made, are binding only *when* made, and upon subjects and objects upon which they *can* operate.

The regulations and decisions upon the subject in hand, adopted and made before April 30, 1890, were just as operative and binding when in force, as those made after that date, and were the standards fixing rights and liabilities, up to April 30, 1890; and while Letter M would be valid as to *future* transactions, and perhaps as to past, if Smith had remained in office and had the deposits in hand at the date of the new order, this would follow only because the Department had adopted the rule for the first time (and intended that the Government should be bound by it), that deposit by the entryman was, *de facto* and *de jure*, payment for the land.

Confessedly, by Letter M, this was never the rule before, and "*reluctantly*" changed in this case.

The letter could only operate upon pending cases to the effect of relieving the citizen from the burden of a second deposit.

Smith was out of office long before; the money he had, except what Christy secured and repaid, was squandered and Smith insolvent, and therefore there was nothing upon which the order could operate except the *res* which the Government controlled, and such as should afterwards come to the hands of its officers.

Surely, the method of business and the status of the citizen, as well as the relation of the officers, all were different *after* Letter M, than before. The difference is plain: *Before*, deposit was only deposit pure and simple, at the risk of the citizen; the money *his* money until final receipt, and not "public money." After Letter M, deposit was *de facto* payment, and the risk taken by the Government.

Before Letter M, the Government had no concern with the money until final receipt; after this, it had all the con-

cern and all the risk, and therefore the Commissioner could not, by the adoption of a new rule entirely changing the relation of the Government toward a fund, create a liability as to past transactions, and especially when the custodian was out of office, where no liability at all existed when the transactions were closed, or the official relation ceased to exist.

Drake was bound by the new order; Smith was not, of course.

The theory of the court below was that the Government had, by Letter M, accepted the deposit as payment, and has, upon these "payments" to Smith, issued final receipts. (Tr., p. 49.)

The error in this is that the Government did not accept the deposits as payment when made to Smith; never.

The Government then, and during all Smith's incumbency, regarded them as *merely deposits*, at the citizen's risk, and not as payments at all.

The only legal effect of Letter M was to so change existing rules, that upon equitable grounds, to relieve the entryman from a second deposit, cases might be passed, upon the showing that the deposit had been made with Smith, and the entries allowed not because of *payment*, as *payment*, but "Allowed by Letter M, of April 30."

It is not a case of whether the rules and regulations in force at the date of an official bond of a receiver of public moneys, become so much a part of the contract, that they may not be subsequently changed, without consent of the sureties.

I concede this may be done, and that any change in the regulations may be made, not in conflict with existing law, *so long as the principal remains in office;* but at the termination of his term, his liability, and that of his sureties, is

fixed by the regulations in force during his term, and the new regulations affect only future transactions and such property as is under direct official control at the time.

The hardship of the rule contended for below, is well illustrated in this case.

Mr. Christy had secured $25,000 in cash of these deposits from Smith, "to protect the bondsmen."

The agent of the Department, who came out and took possession of the office and assets of the Government late in November, 1889, told Mr. Christy, after full knowledge, that "Smith's accounts with the Government were all straight, and that he didn't owe the Government a dollar," and this was true under the law and the regulations then in force.

Mr. Christy paid out this $25,000 on that assurance before April 30, 1890. Now, it is apparently sincerely insisted that although while Mr. Christy had the money for the protection of appellants, and the Government was not only in fact not making any claim to any part of it, and could not, under its regulations and department decisions, yet after the securities had paid out this money on equitable as well as legal grounds to the original depositors, and because of a new rule, established reluctantly, months afterwards, a new liability to repay all this money was created, and a recovery on this bond is possible in such case.

This was held below, but as is confidently submitted, on erroneous grounds, and we ask a reversal of the judgment appealed from.

Respectfully submitted,

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